Supreme Court of the United States

OCTOBER TERM, 1946

No. 338

MAX KUT,

Appellant,

v.

BUREAU OF UNEMPLOYMENT COMPENSATION OF THE STATE OF OHIO, ET AL.,

Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO

PETITION FOR REHEARING

Max Kut, appellant, respectfully petitions the Court to reconsider the Court's order entered October 14, 1946, granting appellee's motion to dismiss, and dismissing appellant's appeal on the ground that the decision of the Supreme Court of Ohio sought to be reviewed was based upon a non-federal ground adequate to support it, citing *Berea College* v. *Kentucky*, 211 U. S. 45.

When taking the appeal, we were cognizant of this decision and of the rule that, if the non-federal ground has fair support, this Court is not at liberty to inquire whether it is right or wrong, but must accept it as the Court does other state decisions on non-federal questions. But, with great respect, we venture to urge that if the Court will permit, we shall be able to show that the non-federal ground has

no fair support either in fact or in law; and that this case comes rather within *Lawrence* v. *State Tax Commission of Mississippi*, 286 U. S. 276, in which the Court said (p. 282):

> "Even though the claimed constitutional protection be denied on non-federal grounds, it is the province of this Court to inquire whether the decision of the state court rests upon a fair or substantial basis. If unsubstantial, constitutional obligations may not be thus avoided." (Citing cases.)

and (id. bot.):

> "We therefore conclude that the purported non-federal ground put forward by the state court for its refusal to decide the constitutional question was unsubstantial and illusory, and that the appellant may invoke the jurisdiction of this Court to decide the question."

In *Ward* v. *Love County*, 253 U. S. 17, 22, cited by this Court in the *Lawrence* case, *supra*, this Court said:

> "It therefore is within our province to inquire not only whether the right was denied in express terms, but also whether it was denied in substance and effect, as by putting forward non-federal grounds of decision that were without any fair or substantial support."

The *Lawrence* case also cites *Enterprise Irrig. Dist.* v. *Canal Co.*, 243 U. S. 157, in which at p. 164 is said a review by this Court cannot be prevented

> "where the non-federal ground is so certainly unfounded that it properly may be regarded as essentially arbitrary or a mere device to prevent a review of the decision upon the federal question."

Our "Statement As To Jurisdiction" (Pp. 2-3) cites the statute of Ohio in force at the time involved, but does not sufficiently emphasize the second paragraph of G. C. § 1345-6b, reading:

> "An individual who has been discharged for just cause in connection with his work or who has voluntarily quit his work without just cause in connection with his work and thereafter is unable to secure other employment, shall have a waiting period of three additional weeks during which no benefits shall be payable."

From this provision it is apparent that an individual does not impair his right to unemployment compensation under the Ohio Act, unless he

> "voluntarily quit his work without just cause. . . ."

The Ohio Supreme Court opinion does not mention at all or consider this provision, which is an integral part of the statute as much as any other section and vitally applicable to this case. The Ohio Supreme Court merely cites Section 1345-6a (4) (P. 51). It does mention that Kut was first an order clerk and subsequently became a so-called checker (Pp. 51-53). But it inexcusably omits to mention that to accept again the position of ~~checker~~ order clerk would be a demotion, both as respects type of position and pay.

It is true, as mentioned in the statement opposing jurisdiction (P. 6) that the Board of Review found Kut was offered and refused to take his former position (P. 38). This was never disputed. But neither the Board of Review nor any court found or could have found that Kut

> "voluntarily quit his work without just cause."

On the contrary, the undisputed evidence shows that he was given his release or quit his work for "just cause." The Board merely found his employment terminated March 7, 1944 (P. 24) and assumed he had quit his work with just cause. The Board disallowed his claim solely because of his refusal to work in new employments tendered requiring him, contrary to his former work, to work on Saturdays.

The Common Pleas Court in its judgment of reversal expressly found (P. 42):

> "3. That appellant voluntarily quit his work at Albers Super Markets, Inc., on March 7, 1944, for just cause and did not secure other employment until April 4, 1944."

On the undisputed facts, this finding is correct. As matter of law, Kut's leaving with the employer's consent and release rather than to accept a demotion as to type of work and compensation is "for just cause." In *Hoyer, Plaintiff* v. *United Dressed Beef Company, Inc.*, U. S. D. C., S. D. Cal., Central Div. (decided May 31, 1946, not yet reported in Federal Supplement but appearing in 3 CCH Labor Law Service, p. 69570, par. 63,271), a change by the employer in his method of compensation from a salary to a commission basis which a veteran refused to accept after re-employment was held to be a discharge "without cause." This decision appeared after the decision of the Ohio Supreme Court. But, even if it had not and we had known of it, we should not have cited it there because, until the decision of the Supreme Court, there was no intimation at any stage of the proceedings and we had no idea that the justification for Kut's leaving was to be an issue.

The Bureau took an appeal on law only, not on fact and law. This finding of just cause was never questioned either in the review by the Court of Appeals or in the Supreme Court. We assert that when a Supreme Court after deciding adversely to appellant the constitutional question, which alone was raised or argued, drags in additionally a non-federal ground, not raised or argued and unsupported by the facts, findings or appellate procedure, decision of the non-federal question being without reference to that portion of the statute which would necessarily have made the decision the contrary, this is only for the

obvious purpose of preventing review by this Court of the important constitutional question made in the record and should not be permitted to succeed.

The question is indeed important and should be resolved sometime by this Court. We ask the Court, in view of the speciousness and unsupported nature of the non-federal ground decision and the great burden of again going through five tribunals in another case involving the constitutional question before reaching this Court, that even if the Court is not completely convinced, at least that it grant the slight time required for argument if probable jurisdiction should be noted.

We respectfully submit, in more detail, that the decision of the Supreme Court of Ohio does not rest upon a permissible or tenable non-federal ground:

1. The original disallowance of appellant's application for benefits was made by the Administrator *solely* on the ground that the claimant was not available for work on a Saturday (P. 5). It was never contended by the Administrator that appellant had not quit his employment for just cause. This is clearly established by the "Notice of Ineligibility" (P. 5) which stated:

> "Facts available establish that the claimant is not available for work on a Saturday. He is therefore not available for work within the meaning of Section 1345-6-a-(4), General Code and Paragraph 412 of the Rules and Regulations."

2. In the administrative hearing before the referee appointed by the Bureau of Unemployment Compensation, the reason for denying benefits *related solely to availability after release.* The referee took the position that because claimant was not available for work on his religious Sabbath, he was not entitled to benefits under the Act (P. 6). It was not even suggested in the opinion of the referee that appellant had not quit his employment for just cause.

3. The majority decision of the Board of Review of the Ohio Bureau of Unemployment Compensation affirmed the decision of the referee *solely on the ground that the claimant was not available for work on his Sabbath* (Pp. 7, 23). Here, again, there was no suggestion that claimant was not entitled to compensation because of the circumstances upon which his employment with Albers Super Markets, Inc. was terminated.

4. On the appeal from the Board of Review to the Court of Common Pleas for Hamilton County, Ohio, that Court, in its opinion, found that "Rather than *demote* the appellant, the employer *gave him a release.* His employment was thus terminated" (Pp. 9, 37). This certainly is not saying and is the opposite of saying that he

"quit his work without just cause. . . ."

5. The judgment entry of the Common Pleas Court specifically included in its finding the fact that appellant had quit his work *"for just cause"* (Pp. 9, 41).

6. The Attorney General of Ohio, in connection with his appeal to the Court of Appeals for the First Appellate District, did not assign as error (Printed Record O. S. Ct. p. 2) the finding in the opinion and judgment of the Common Pleas Court that appellant's employer gave him his release and that he quit work "for just cause," nor was there any assignment of error that the finding of the Common Pleas Court was not sustained by the evidence or was against the weight of the evidence (P. 10). The appeal was "on questions of law" (R. O. S. Ct., p. 1).

7. The syllabus of the opinion of the Court of Appeals, in which all of the judges concurred, shows that the denial of compensation to appellant was upheld *solely on the ground that appellant refused employment requiring work on Saturday* (P. 42). The opinion of the Court of Appeals

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(P. 43) shows that the wages of a "checker" were higher than those of an "order clerk" and adds:

> "Since the only work that Albers Super Markets, Inc., had to offer was to *return him back* as order clerk, at which he had started, the employer assumed that this would not be satisfactory to Kut and gave him his release, thus terminating his employment on March 7, 1944."

This, too, is the opposite of a statement either that Kut quit or "quit without just cause."

8. In the judgment entry of reversal of the Court of Appeals, the sole basis of the decision against appellant was that because he would not work on his religious Sabbath, he was thereby rendered ineligible for unemployment compensation benefits and that this did not infringe on any of his constitutional rights. There was no suggestion in either the opinion or judgment entry of the Court of Appeals that the reason why appellant was held not entitled to benefits was because he voluntarily left his employment with Albers Super Markets, Inc. without just cause (Pp. 42-49). By G. C. Sec. 12223-21, the finding of the Common Pleas Court that he quit for just cause, was thus affirmed.

9. After appellant appealed to the Supreme Court of Ohio as of right upon the claimed constitutional question involved, and the motion to dismiss the appeal for want of a substantial constitutional question was overruled, the Attorney General took no cross appeal to review the findings of the lower courts that appellant had been given his release by his employer and that he quit "for just cause" (P. 12).

10. In the brief of the Attorney General on his motion to dismiss appellant's appeal as of right to the Supreme Court of Ohio, the Attorney General did not question the findings of the lower courts that appellant had quit for

just cause. On the contrary, the Attorney General confirmed in his brief that *"The sole question then is whether he had a right to refuse the offer of work on the ground that he would not work on Saturdays because of his religion"* (P. 13).

11. Following briefs and oral argument, the Supreme Court of Ohio overruled the motion of the Attorney General to dismiss the appeal as of right, thereby recognizing that there was a serious constitutional question involved in the proceeding. Indeed, the entry of the Supreme Court of Ohio specifically found that "there were reasonable grounds for this appeal" (P. 17). The opinion of the Ohio Supreme Court apparently forgets that the case was before it as of right because of a constitutional question and mentions only (P. 51 top) that the case was there

> "upon the allowance of the plaintiff's motion to certify the record."

12. By stipulation of counsel for the parties, filed in the Supreme Court of Ohio, it was "agreed that the opinion and judgment of the Common Pleas Court and the opinion and judgment of the Court of Appeals *correctly and sufficiently present the facts necessary to be considered by the Court"* (P. 54). As already shown, these opinions and judgments clearly established that the employer had given appellant his release and that he had quit his work for just cause. In view of this stipulation, *there was nothing in the record before the Supreme Court of Ohio on which that Court could have found and it did not find that appellant voluntarily left his employment without just cause.*

13. By the provisions of Ohio General Code, Section 12223-31, the Supreme Court of Ohio does not review the findings of a lower court. It only inquires whether there was any evidence to support such findings; if there was any evidence to support them, the finding stands. See *State,*

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ex rel. Kobelt, Appellee v. *Baker, et al., Trustees of Police Relief Fund of City of Parma, et al., Appellants,* 137 O. S. 337 (1940), wherein the court announced the rule as follows:

> "This court has held repeatedly that it will not weigh the evidence but will examine the record to ascertain whether there is any evidence in support of the contention of the prevailing party."

See, also, *Keesecker* v. *The G. M. McKelvey Co.,* 141 O. S. 162, 169, second par. syl.

This is much like the rule that prevails in review by a Federal Court of Appeals of the judgment of the District Court in an action at law. Certain it is that there was evidence here, and indeed unquestioned, uncontradicted and conclusive evidence, that appellant left his employment for just cause.

14. A non-federal ground can be claimed on nothing more substantial than a statement in the decision of the Ohio Supreme Court that appellant refused to accept a demotion, implying therefrom that such termination of employment was voluntary (P. 51), but not that it was without just cause. Such a statement the Supreme Court of Ohio had no reason or power to make. Without a finding that Kut quit without just cause, it means nothing and furnishes no ground for denying him compensation. Such a decision is insufficient, arbitrary, contrary to all the findings throughout the administrative proceedings and lower Ohio courts and *contrary to the specific stipulation entered into with the Court's permission by counsel with respect to the record, never questioned or repudiated.*

We submit that the non-federal ground set forth in the decision of the Supreme Court of Ohio is insufficient as matter of law to avoid Kut's claim, has no support in the record and is directly contrary to the undisputed facts in the record. We urge, therefore, that on reconsideration

of this appeal, probable jurisdiction be noted and appellee's motion to dismiss be overruled.

Respectfully submitted,

MURRAY SEASONGOOD,
LESTER A. JAFFE,
Counsel for Appellant.

PAXTON & SEASONGOOD,
Of Counsel.

We, Murray Seasongood and Lester A. Jaffe, of counsel for appellant, certify that the foregoing petition for rehearing is, in our opinion, well founded, that it is filed in good faith and not interposed for delay.

MURRAY SEASONGOOD,
LESTER A. JAFFE.